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IN THE

Supreme Court of the United States

October Term, 1959

No. 563

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* COSTENZE P. VALENTI, on the petition of GILBERT S. ROSENTHAL,

Appellant,

AGAINST

JOHN J. McCLOSKEY, Sheriff of the City of New York, etc., and COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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JOHN J. McCLOSKEY, Sheriff of the City of New York, etc., and COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

The appellant appeals from an order of the Court of Appeals of the State of New York entered on the 8th day of July, 1959, which affirmed an order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, which unanimously affirmed an order of the Supreme Court of the State of New York, Special Term in and for the County of New York, dismissing a writ of *habeas corpus* brought on behalf of the appellant. The appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 6 N. Y. 2d 390. The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department is reported in 8 A. D. 2d 74. The opinion of the Supreme Court of the State of New York, Special Term, in and for the County of New York is reported in 186 N. Y. S. 2d 798. A copy of the opinion of the Court of Appeals of the State of New York is attached hereto and marked Appendix A. The opinions of the lower courts may be found at folios 832-848, 889-945 of the Record on Appeal to the Court of Appeals.

Jurisdiction

This action was commenced by a Writ of *Habeas Corpus* emanating from the Supreme Court of the State of New York, Special Term, in and for the County of New York, a Court of original jurisdiction, dated the 20th day of March, 1959. On the 26th day of March, 1959 the Writ was dismissed by order duly made and entered.

The Writ alleged the illegality of the appellant's imprisonment based upon his compliance with a certain order and warrant of commitment made by Mr. Justice Tilzer, one of the Judges of the Supreme Court of the State of New York, and more particularly set forth at folios 121-135 of the Record on Appeal to the Court of Appeals. Appellant's initial incarceration resulted from his absolute refusal to answer twenty-six questions despite his being granted immunity.

After complying with the order and warrant of commitment the appellant requested his release. This was forthwith denied and opposed. Several appeals were had and

the appellant presently remains incarcerated for a period that may involve the term of his life.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2):

> "Section 1257. State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Herndon v. *Lowry*, 301 U. S. 242.

Questions Presented

The questions presented for review involve a vague and harsh statute, Section 406 of the Civil Practice Act of the State of New York. It is alleged that this statute is in violation of and repugnant to Section 1 Amendment XIV of the Constitution of the United States, in that it deprives the appellant of life and liberty without due process of law and abridges his privileges and immunities as a citizen of the United States.

Where a statute decrees life imprisonment to a witness who refused to answer certain questions *outside* the presence of the Court, may such statute demand compliance with its provisions without delineating and revealing the manner, method and by whom an adjudication and determi-

nation shall be made regarding the assertion that the witness has complied with its terms.

May such statute, coercive and cruel, imposing as it does a life sentence, fail to set forth any norm or guide to reveal the fact or failure of compliance by the witness?

Where a statute permits the summary commitment of a witness for a contempt *without* the presence of the Court and *without* a hearing and *without* affording the witness an opportunity of defending and submitting his proof of compliance, may such statute fail to define or acquaint the witness with the requisites necessary to comply with and satisfy its mandate in order that the witness may purge his contempt and obtain his release.

May a statute permit an unlimited and unbridled use of judicial and administrative discretion in the determination that the miscreant has complied and in so doing does it not foster and demand a gross abuse of discretion?

Where a statute, under the guise of a contempt proceeding, permits the imprisonment of a witness for perjury and thereby circumvents the traditional mechanisms of the criminal law and constitutional safeguards, does not such statute violate the concept of due process of law, particularly so, when the witness is compelled to serve a life term?

May a statute demand a form of compliance that is at war with truth and require that the witness satisfy the unknown, vague and nebulous requirements of court and agency?

May a statute provide for an indefinite term of imprisonment, in the instant case a life sentence, without permitting the witness to submit proof of compliance with the terms of the law in an effort to purge his contempt and obtain his release?

May a statute permit the continued confinement of a witness despite the fact that further confinement has been rendered academic because the information demanded of the witness, despite his lack of knowledge, has been obtained by the Commission of Investigation through other witnesses?

May the scope of a statute and the order entered thereunder committing the appellant, be enlarged to include questions and answers not originally contained in the warrant and order of commitment?

May reliance be had on the entire record made by the appellant before the Commission of Investigation in order to determine whether or not the witness has complied with the order of commitment and has answered the vital twenty-six questions. In effect may perjury be punished as a contempt?

Statutes Involved

Section 406 of the Civil Practice Act of the State of New York.

Title 28, United States Code, Section 1257, Subdivision 2.

Amendment XIV, Section 1, Constitution of the United States.

Statement

The present appeal has a long and emotional historical background. On November 14, 1957, in the small New York town of Apalachin, Costenze P. Valenti and a group of other gentlemen attended a barbecue party given by their host, Joseph Barbara, at his home. This party was suddenly interrupted by an illegal raid made by members of the New York State Police and certain members of the

United States Alcoholic and Tax Unit. No arrests were made but many men, the appellant included, upon leaving, were forced to attend the New York State Police barracks at Vestal, New York and submit to an onerous interrogation and search.

After its creation by the New York State Legislature, the Commission of Investigation, with blatant publicity, announced that it intended to investigate what it termed "The Apalachin Meeting". Prior to convening for public hearings, a barrage of publicity was again loosed and a breathless public was prepared for momentous disclosures of nefarious dealings, criminal activities and corruption of public officials. In this atmosphere the appellant was subpoenaed from his home in Rochester, New York, to appear and testify in New York City a distance of over 400 miles.

Upon advice of counsel the appellant invoked his privilege against self-incrimination and refused to answer any of the questions propounded. The Commission of Investigation then granted him immunity and Costenze P. Valenti remained adamant and refused to reply to twenty-six questions. He asserted that the proffered immunity was not broad enough to remove the privilege against self-incrimination.

By order to show cause, the appellee moved to punish the appellant for a contempt. A "Kangaroo" hearing was held and the Supreme Court of the State of New York (Tilzer, J.) committed the appellant to the Civil Jail of the City of New York until he truthfully and responsively make answer to twenty-six questions. These questions were made the basis for the order and warrant of commitment. On August 22, 1958, the appellant was committed to the Civil Jail in New York County and has remained there until the present time. Appeals were taken to the Supreme Court of the State of New York, Appellate Divi-

sion, First Judicial Department and to the Court of Appeals of the State of New York. These Courts sustained the ruling of the lowest court and upheld the validity of the order and warrant of commitment made pursuant to Section 406 of the Civil Practice of the State of New York.

Immediately thereafter, appellant's counsel communicated with the Chief Counsel for the Commission of Investigation and requested an immediate hearing. Counsel stressed that the appellant desired to comply with the original order of commitment and thereby obtain his release.

The appellee, for unknown reasons, refused to comply with this request and it became necessary to obtain a Writ of *Habeas Corpus*, returnable March 19, 1959 at Special Term, Supreme Court of the State of New York, in and for the County of New York. On that date, due to the intervention and good offices of the Court, agreement was reached and a hearing before the Commission was arranged for the following day. It was assumed that the appellant would be afforded an honest and fair opportunity to purge his contempt and answer the twenty-six questions the subject matter of his imprisonment. The fairness of that hearing is best disclosed by the record.

The Commission of Investigation refused, at the close of the public hearing, to consent to appellant's release. A Writ of *Habeas Corpus* again was obtained, returnable March 20, 1959. No hearing was had on that date and on March 25, 1959, the Supreme Court of the State of New York, Special Term, in and for the County of New York, (Nathan, J.) dismissed the appellant's Writ and continued his imprisonment (Opinion of Nathan, J., at fols. 832-848).

An appeal to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, was had. That Court unanimously affirmed the order of the lower court on May 11, 1959 and on May 13, 1959 it granted leave to appeal to the Court of Appeals of the State of New York (Opinion of Breitel, J., at fols. 889-945).

Appeal was then had to the Court of Appeals of the State of New York and on July 8, 1959, that Court sustained the order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department by a 4-3 decision.

The essence of this appeal refines itself simply. The appellant's initial incarceration was based upon an erroneous but categorical refusal to answer twenty-six questions propounded to him after a grant of immunity. After exhausting his legal remedies he made an honest and reasonable effort to comply with the order of commitment. He appeared before the inquisitorial body and forthrightly replied, not only to the twenty-six questions, but to countless others. This it would seem satisfied the mandate of confinement but not the appellee. Resistance and refusal was encountered and the appellant was and is *doomed to remain incarcerated for the remainder of his life.*

In the lower courts the appellant argued that he had complied with the order of commitment. It was submitted that the responses to the twenty-six questions, standing alone, indicated complete compliance with the order and warrant of commitment. Alternatively it was emphasized that these responses when viewed in relation to all the answers made, clearly revealed that the appellant was entitled to his release. An attempt was made to distinguish the contemptuous answer from the perjurious answer. The appellant contended that nothing in the record revealed an answer or answers, so evasive and so patently and palpably false

as to lead to the inescapable conclusion that he was obstructing the inquisitorial functions of the Commission of Investigation.

The appellant contended that, rather than being guilty of evasively obstructive conduct, it might be suggested that he had committed perjury. If such be the case he was entitled to the traditional procedures guaranteed by the Constitutions of the State of New York and that of the United States of America—indictment, trial by jury, confrontation by his accusers, the right to call witnesses, the right to cross-examine witnesses and due process of law. To use the subterfuge of a contempt commitment in place of a criminal charge of perjury is to do violence to and deny to the appellant Due Process of Law.

The Questions Are Substantial

The issues presented by this appeal are most vital and substantial, resting as they do on the singular and basic proposition of constitutional fair play, denied by a statute. The appellant, a native of Rochester, New York, has been, over a period of months pilloried in the press, on radio and television. His local newspapers have been highly critical of his initial reluctance to answer questions despite the fact that he had been afforded immunity. The climate of public opinion has undergone change. The press and the general public came to the realization that what was being done to appellant Valenti could be done to them or to their next-door neighbor. A recent editorial in the Rochester Times-Union, dated October 7, 1959, a paper that had been highly critical of appellant's prior behavior, mirrors the present trend of thought and concern. This editorial poses the problem with simplicity and lucidity.

Valenti Appeal Would End Doubt

"A good many people who know nothing whatever about the merits of the Valenti case will be relieved to note that the U. S. Supreme Court will have opportunity to pass on the issues involved.

Stanley Valenti, *though he has no criminal record* was present at the gangland convention at Apalachin in November, 1957. When he refused to answer questions put by the State Commission of Investigation after being granted immunity, he was committed to the Civil Jail in New York, Aug. 28, 1958.

Later when he sought to purge himself, the commission found his account of his presence at Apalachin so 'inherently incredible' as to amount to a refusal to testify. The Court of Appeals, by a split decision, upheld that view, and he is still in jail more than 13 months after he was committed.

We do not know whether he belongs there or not. But if, as it appears, anyone can get himself into a situation where he can be held in jail indefinitely without criminal charge, the facts and the law of that situation ought to be reviewed by the highest court." (Emphasis supplied.)

The questions raised have substantial vitality because they concern a single individual who is hopelessly imprisoned, never knowing the nature of the charge against him; never understanding what is expected of him; never being able to formulate a character of testimony deemed satisfactory to both Court and Inquisitor. The problem was most vividly described by the author, *Franz Kafka* in his novel "*The Trial*". This is the human side of the issue.

The legal posture inherent in this argument involves a statute that imposes a most drastic penalty but does not

formulate criteria to enable one enmeshed in its toils to satisfy its standards.

Section 406 of the Civil Practice of the State of New York permits, among other things, the coercion of a witness who fails either to answer reasonable and proper questions propounded or who fails to appear after being duly subpoenaed. The coercion permitted is incarceration for life. One may quarrel with the cruelness of the punishment but one cannot argue in behalf of a refusal of a witness either to answer or appear.

Such is not the issue in this appeal. The appellant has appeared and has testified, fully, truthfully and far beyond the standard required of him by the mandate of commitment. He has been subjected to gruelling examination on matters not contemplated by the committing court. This inherently vague statute, violative of the Due Process Clause of Amendment XIV of the Constitution of the United States, and by virtue of these fatal defects, has been extended into an area not contemplated or authorized by the legislature.

Having complied with the order of the Court the appellant is continued in incarceration, without a hearing, without a formal charge and without knowing the method wherein and whereby he may obtain his freedom. The appellant is told that he may return and furnish the Inquisitor with a different character of testimony with the hope, that despite its possible perjurious quality, he may be granted relief. The statute then permits an individual, under the guise of a contempt, to be held in jail for a perjury or demands a perjury, without the intervention of the processes attendant upon the Administration of the Criminal Law.

It is agreed that States are permitted under the Fourteenth Amendment of the United States Constitution to regulate their civil and criminal procedure in accordance

with their basic conceptions of policy and fair play. *Humes* v. *Robbins*, 128 F. S. 586. However, if in so doing, violence is done to "some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," then the States will be prohibited in their behavior. *Snyder* v. *Commonwealth of Massachusetts*, 291 U. S. 97; *Brown* v. *State of Mississippi*, 297 U. S. 278.

In re Oliver, 333 U. S. 257;
Chambers v. *Florida*, 309 U. S. 227, 236-237.

The violence complained of here rests on several factors. A state statute is extended to include compliance with a Court order without delineating the method, character, quality and terms of compliance. It permits a summary imprisonment without the intervention of a hearing, the taking of testimony, the submission of evidence, the cross-examination of witnesses. It permits this *summary* confinement for an alleged contempt not occurring within the hearing and presence of the Court. It demands a character of testimony not within the knowledge of the contemnor without acquainting the witness as to what is demanded, required and sought. By its very vagueness, it imposes and clothes the Courts, and the inquisitorial body with a discretion, that is grossly abused in application and subject to the mood and whim of those empowered to determine compliance with the mandate.

> "The question thus proposed to a jury involves pure speculation * * *. The law as thus construed licenses the jury to create its own standards in each case * * *." *Herndon* v. *Lowry*, 301 U. S. 242, 263. Quoting with approval *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 581.

> "So vague and indeterminate are the boundaries thus set * * * that the law necessarily violates the guarantees of liberty embodied in the 14th Amendment." *Herndon* v. *Lowry* (supra, p. 263).

The statute creates and nourishes a paradoxical situation, having no basis in law and reason. It permits the charge of perjury, wherein a definite term of imprisonment is established by law, wherein procedural safeguards are guaranteed, to be punished as a contempt, coercive or otherwise. The appellant's testimony has been characterized by law, without resort to any standard of comparison contained within the record, or in the statute. It is labelled such by administrative and judicial whim.

In *United States* v. *Appel*, D. C., 211 Fed. Rep. 495, 496, Judge Learned Hand set a standard wherein the oppressive use of contempt to punish perjury could be avoided.

> "For instance it could not be enough for a witness to say that he did not remember where he slept the night before, if he was sane or sober or that he could tell whether he had been married more than a week."

This Court in *In the Matter of Michael*, 326 U. S. 224, discussed perjury *per se vis-a-vis* contempt. At pages 228-229 it stated that:

> "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process.
>
> "It is in this sense, doubtless, that the Court spoke, when it decided that perjury alone does not constitute an 'obstruction' which justifies exertion of the contempt power."

See also:

Blim v. *United States*, 7 Cir., 68 F. (2) 484.

This rule rests on a most substantial foundation.

> "It is true that there are decided cases which treat perjury, without any other element as adequate to sustain a punishment for contempt. But the mistake is we think evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object and purpose of exacting from the witness a character of testimony which the court would deem truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen as a witness in a court would be gravely imperiled." *Ex parte Hudgins, Petitioner*, 249 U. S. 378, 384."

Violence has been done to the appellant's rights and greater wrong has been perpetrated against the basic concept of constitutional fair play. For every wrong there must be a remedy and a forum wherein the wrong may be expunged.

November 30th, 1959.

Respectfully submitted,

GILBERT S. ROSENTHAL,
Counsel for the Appellant.

APPENDIX A

Opinions of the Court of Appeals of the State of New York

The People of the State of New York ex rel. Frank J. Valenti, on the Petition of Gilbert S. Rosenthal, Respondent, against John J. McCloskey, as Sheriff of the City of New York, et al., Appellants.

The People of the State of New York ex rel. Costenze P. Valenti, on the Petition of Gilbert S. Rosenthal, Appellant, against John J. McCloskey, as Sheriff of the City of New York et al., Respondents.

Decided July 8, 1959.

Appeal, in the first above-entitled proceeding, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 12, 1959, which reversed, on the law and the facts, an order of the Supreme Court at Special Term (Edgar J. Nathan, Jr., J.), entered in New York County, dismissing a writ of habeas corpus and remanding relator to the Sheriff of the City of New York, sustained the writ and directed the Sheriff of the City of New York to discharge relator from his custody. Appeal, in the second above-entitled proceeding, by permission of the Appellate Division of the Supreme Court in the first Judicial Department, from an order of said court, entered May 11, 1959, which unanimously affirmed an order of the Supreme Court at Special Term (Edgar J. Nathan, Jr., J.), entered in New York County, dismissing a writ of habeas corpus and remanding relator to the Sheriff of the City of New York.

Eliot H. Lumbard, Nathan Skolnik, Arnold M. Weiss, Alfred Donati, Jr., and *Joseph Fisch* for Commission of Investigation, appellant in the first above-entitled pro-

ceeding and respondent in the second above-entitled proceeding.

Gilbert S. Rosenthal and *Aaron J. Jaffe* for Frank J. Valenti, respondent in the first above-entitled proceeding, and Costenze P. Valenti, appellant in the second above-entitled proceeding.

FROESSEL, J. The real question presented on this appeal is whether a witness before the State Commission of Investigation, who answers questions enumerated in a warrant of commitment procured by the commission, may be incarcerated indefinitely until he consents to give a character of testimony which in the opinion of the commission and the courts is not perjured.

Relators, along with others, were subpoenaed to testify before the Commission of Investigation of the State of New York at public hearings, which commenced during August of 1958, concerning the so-called Apalachin "meeting" held at the home of Joseph Barbara, Sr., in Apalachin, Tioga County, New York. Relators appeared before the commission and claimed their privilege against self incrimination as to all questions asked other than those directed merely to identifying data. After the commission granted relators complete immunity from prosecution by New York State authorities, they persisted in their refusal to testify and were committed to civil jail, pursuant to subdivision 3 of section 406 of the Civil Practice Act. That statute provides, in pertinent part, that if a person duly subpoenaed to appear before certain officials and nonjudicial bodies specified in subdivision 1 "refuses without reasonable cause * * * to answer a legal and pertinent question", he may, by order and warrant of the court, be committed to jail "there to remain until he submits to do the act which he was so required to do * * * ".

The orders and warrants committing relators specified 26 questions which relators had refused to answer. This was in accordance with subdivision 4 of section 406, which provides that "if the witness is committed for refusing to answer a question, the question must be inserted in the warrant". The 26 questions were designed to elicit the witnesses' knowledge of Barbara, the circumstances under which they attended the alleged "meeting", what happened there, and any prior relationship among those who attended. The Appellate Division unanimously affirmed the commitment of relators, along with five other recalcitrant witnesses (*Matter of Commission of Investigation v. Lombardozzi*, 7 A D 2d 48), and we unanimously affirmed (5 N Y 2d 1026). The Supreme Court of the United States denied certiorari on June 30, 1959.

Six days after this court's order of affirmance was handed down, the commission convened a hearing, at the request of relators, to give them an opportunity to answer the enumerated questions and obtain their release. Over the repeated objections of counsel, questions far afield of the 26 enumerated in the orders and warrants of commitment were asked; but during the course of the interrogation the 26 specific questions were asked of each witness. The commission concedes that both relators gave "some sort of answer to each question", but contends that the answers given were "in varying degrees, false, evasive, and obstructive of its investigation; indeed in many instances the answers are inherently incredible".

The evidence given by relators in answer to the 26 and directly related questions was virtually the same. On November 13, 1957, Costenze, who was suffering from lead poisoning and not feeling well, decided while at Rochester to take a pleasure and rest trip to New York City for a few days, and asked Frank to join him. Frank agreed to accompany him if they would later go on to Pittsburgh,

where Frank was arranging the sale of his house. He had recently moved from Pittsburgh to Rochester, where Costenze resided, but had not yet disposed of his Pittsburgh home. Costenze agreed to the Pittsburgh trip, and on their way to New York they stopped at Syracuse to visit a friend named Sam Scro. They spent the night of the 13th in a motel on the outskirts of Syracuse.

The following morning, during breakfast, Costenze suggested that before proceeding to New York they drive to Apalachin to visit a friend who was ill. Frank had never before met this friend, one Barbara, but, without eliciting or obtaining any additional information, agreed to the detour since he had no definite appointment in Pittsburgh and his brother was killing "three or four days anyway". Costenze had met Barbara some 5 to 7 years previously at a beer convention in Rochester, and had met him some 3 or 4 times since—once at a wedding, though he did not recall the details, and once at Barbara's Apalachin home, when he also dropped in unannounced to inquire after Barbara's health. During the years he had known Barbara they never corresponded, spoke on the telephone, or had any business dealings, and Barbara had never visited Costenze at the latter's home. As to his knowledge of Barbara's illness, Costenze testified that when he had first met Barbara at the convention Barbara told him that he was not feeling well and had lost a tremendous amount of weight. He subsequently learned that Barbara was going to undergo a heart operation, but he could not recall when or where he had learned this.

When they arrived at Barbara's home, they were both surprised to see such a large gathering there, which they estimated to be anywhere from 25 to 70 people. Frank testified: "I didn't go over there and visit a guy and go over and count how many people there was there. I don't know how many was there. There could have been 30, 20,

40; I don't know. Three or four guys here with a sandwich, drinking; four or five guys at one end of the yard and at the other end of the yard." and then in answer to question 14, which called for the *approximate* number of persons present stated: "To the best of my knowledge, I'd say I saw about 30 or 40 or 50 people, tops." Costenze testified that he "honestly and truthfully" did not remember how many people were there, as he did not count them, but later, in specific answer to question 14, answered: "Approximately 30, 25."

When they arrived on the premises they proceeded directly to the house and met their host in the livingroom. Costenze introduced Frank to Barbara, and Frank said he "was glad to meet him and that was it. To me he was a stranger". Costenze inquired after Barbara's health; Barbara said he "wasn't feeling like he should and that he had to take it easy", and 5 or 10 minutes of casual conversation ensued. "All pertaining to his, more or less, you'd say, medical report". Barbara then invited them to partake of food and drink, which was available in the yard on a self-service basis, and to "walk around, make yourself right at home". Neither Frank nor Costenze saw Barbara again until they said their goodbyes some 6 hours later.

Both Frank and Costenze testified that they met a number of friends and acquaintances on the premises, whom they identified by name, and their conversation was only casual. There were no public officials present, to their knowledge, and neither had had any business dealings with any of the persons present. Frank testified that he did not ask Barbara or any of the other persons he met why they had come, or what the occasion for such a large gathering was, as it was not his home and he did not think it was any of his business. Costenze testified likewise, except as to a conversation he had with a friend named

Jimmy La Duca, whom he met on the premises. He had no discussion with La Duca as to why so many people were there, since "That wasn't my home. I don't think it was up to me to ask anything. I went to see a sick friend and I don't see where it's any of my business to go around asking people 'What are you doing here?' It's not my house."

During the six hours they were there they wandered around admiring the premises and the surrounding countryside, sat down on chairs in the yard, and partook of the refreshments. They did not return to the house, and both repeatedly testified that there was no "meeting" and that no one addressed the gathering. Frank testified that Costenze "was with me, practically all the time", and Costenze testified likewise. They left at about 6:00 P.M., and, according to Costenze, Barbara "didn't say nothing outside of goodbye. He was glad to see me. I was glad to see him. I told him to take care of himself and to do what the doctor tells him to do, and that was it."

Upon leaving the premises they were stopped by the State Police and taken to the State Police Barracks at Vestal, where they were stripped, frisked and questioned. After they were released, they decided to curtail their trip and return to Rochester. Frank testified that he "was disgusted with the whole thing" and decided to make his Pittsburgh trip alone at a later date. Costenze testified that he "didn't know why I was stopped or why I was frisked, or any of this, why it went on", and "thought it would be best to go home and stay with my wife", who was expecting a child.

At the conclusion of Frank's questioning, counsel sought the consent of the commission to his release on the ground that he had complied with the order and warrant committing him. The chairman refused to give such consent on the ground that Frank's testimony was "unworthy of

belief", "inherently incredible" and "calculated to impede and thwart the efforts of the Commission in this investigation". His basis for so concluding was that "it is incredible to us that if the answers given here are the truth why those answers could not have been given way back last August, when he was first asked about it, and why he had to resort to the privilege against self-incrimination, and, why, from his own standpoint, he found it necessary to serve seven months in prison before coming here and giving us this kind of a story." The chairman adjourned the hearing as to Frank "until such time as he is prepared to come in here and tell us the truth".

Although counsel took vigorous exception to the chairman's remarks with reference to the assertion of the privilege, the chairman later interrogated Costenze at length as to his reason for invoking the privilege against self incrimination. At the conclusion of Costenze' testimony, the chairman stated that he believed his answers to be untrue and advised Costenze, as he had Frank, "that at any time that you are prepared to come forward and tell us the truth the Commission will be ready to hear you".

The narrow issue before us, as framed by Special Term, is "whether the questions have or have not been answered within the purview of the statute". In passing on that issue, it is important to note that relators' prior invocation of the privilege against self incrimination may not be used as a basis for concluding that they have evaded their obligation to answer. In *People ex rel. Falk* v. *Sheriff* (258 N. Y. 437, 439-440), the only case in which this court considered the precise issue now before us, we pointed out that the purpose of a commitment pursuant to subdivision 3 of section 406 of the Civil Practice Act is "to enforce the duty to answer a pertinent inquiry by keeping the witness in jail *till the answer has been supplied* * * * *When once*

that is done, he is entitled to his discharge, though there was evasion or deceit in setting up the claim of privilege whereby an answer was delayed. * * * Whatever contempt may have been involved in his deceitful claim of privilege must have redress in some other proceeding and not improbably in another forum". (See, also, *Slochower* v. *Board of Educ.*, 350 U. S. 551, 557).

It is well-settled law in this State, as recognized in principle by both courts below, that false testimony is not punishable summarily as a *civil* contempt (*Fromme* v. *Gray*, 148 N. Y. 695; *Matter of Foster* v. *Hastings*, 263 N. Y. 311; *Matter of Silberman Dairy Co.* v. *Econopouly*, 177 App. Div. 97), or as a *criminal contempt* (*Matter of Finkel* v. *McCook*, 247 App. Div. 57, affd. 271 N. Y. 636; *People* v. *De Feo*, 284 App. Div. 622, revd. on another ground 308 N. Y. 595; *Matter of Steingut* v. *Imrie*, 270 App. Div. 34). In the *Foster* case we unanimously rejected the argument that "false swearing is not to be distinguished from a refusal to testify", and held that on the issue of perjury the witness who is alleged to have testified falsely "is entitled to a trial by jury under the safeguards of the criminal law" (263 N. Y. 314; see, also, *Matter of Finkel* v. *McCook*, 247 App. Div. 64-65, affd. 271 N. Y. 636, *supra*).

With respect to both civil and criminal contempt, however, the courts of this State have recognized that under certain circumstances a response to a question may be so false and evasive as to be equivalent to no answer at all. Thus in the *Foster* case we noted that "when it plainly appears that the witness *denies knowledge or recollection* of a fact, obviously to evade an answer as to matters within his recollection, the court may refuse to aid in a mere subterfuge and may compel an answer * * *" (263 N. Y. 314, emphasis supplied), and in the *Finkel* case the Appellate Division wrote: "There is a distinction *be-*

tween the untruthful statement which does not clearly appear to be such from the face of the record but is uncovered only with the aid of extrinsic evidence *and* testimony which is so plainly *inconsistent*, so manifestly *contradictory* and so conspicuously unbelievable as to make it apparent from the face of the record itself that the witness has deliberately concealed the truth and has given answers which are replies in form only and which, in substance, are as useless as a complete refusal to answer. This distinction was considered by the Supreme Court of the United States in *Ex parte Hudgings* (249 U. S. 378)." (247 App. Div. 63, emphasis supplied.) (See, also, *People* v. *De Feo*, *supra*, pp. 624-626.)

I think we may safely assume, as did the Appellate Division, that "the rules developed in relation to the distinction between the merely false answer and the evasive one in the field of judicial contempt are wholly applicable to proceedings arising under section 406." (In this connection, note the cases cited by this court in the *Falk* case, 258 N. Y. 439, *supra;* see, also, *Matter of Barnes*, 204 N. Y. 108, 122). This would certainly seem so as regards *civil* contempt under sections 753 (subd. 5) and 744 of the Judiciary Law, pursuant to which a person who refuses to answer after being subpoenaed as a witness may be imprisoned until he performs the act which it is in his power to perform (see *Stewart* v. *Smith*, 186 App. Div. 755; *Ditomasso* v. *Lorerro*, 242 App. Div. 190, 193-194). The function of both a civil contempt and a section 406, subdivision 3, commitment is remedial and coercive, and the recalcitrant witness holds the key to his freedom. We think that it is likewise so as to *criminal* contempt under subdivision 5 of section 750 of the Judiciary Law, pursuant to which a witness may be summarily punished for a "Contumacious and unlawful refusal * * * to answer any legal and proper interrogatory", though it must be

remembered that the maximum term of imprisonment for a summary criminal contempt, under any circumstances, is 60 days (Judiciary Law, § 751; see *Ex parte Hudgings*, 249 U. S. 378, 384).

The problem is to give meaningful content to the distinction between the false answer and the answer that is so false and evasive as to be tantamount to no answer at all. The example given in the *Foster* case (*supra*, p. 314) was the witness who "denies knowledge or recollection of a fact, obviously to evade an answer as to matters within his recollection". In a similar vein, the court in the *De Feo* case noted (284 App. Div. 624-625, *supra*): "*Consistent lack of memory or recollection* of all transactions for a recently passed period relating to large and significant expenditures covering a principal activity of a business is not understandable, except as a deliberate and contemptuous evasion of the questions put." (Emphasis supplied.)

In *United States* v. *Appel*, probably the most oft-cited case on the subject, Judge HAND noted (211 F. 495-496): "it could not be enough for a witness to say that he *did not remember* where he had slept the night before, if he was sane and sober, or that he *could not tell* whether he had been married more than a week." (Emphasis supplied.) The witness in that case had been questioned as to his disposition of certain funds, and, in holding (p. 497) that his story as to alleged gambling losses was "obviously a mere sham" Judge HAND emphasized (p. 496) his inability "to give the names of any places but one of these where he had lost any such sum as he stated, and his entire vagueness about matters which were so recent, and which must have impressed themselves upon his memory at the time to a greater extent. * * *"

In the *Finkel* case (and see, also, *Matter of Kamell*, 170 Misc. 868, affd. 258 App. Div. 723, which involved very

similar facts and the same issue), one of the subjects of a Grand Jury investigation was racketeering in the restaurant and cafeteria business, and of particular concern was an association, ostensibly made up of restaurant and cafeteria owners, the persons in control of which were suspected of extortion in combination with certain labor union officials. Finkel, who was an officer and principal stockholder of a restaurant corporation, was called as a witness and his examination centered around six payments made by him as shown on the books of the corporation; the persons to whom payments were made and the dates thereof; the circumstances surrounding the payments; and any connection they may have had with his joining the association.

In holding that the witness's answers to these questions were equivalent to a "Contumacious and unlawful refusal * * * to answer", i.e., a summary criminal contempt under subdivision 5 of section 750 of the Judiciary Law, the Appellate Division noted (p. 60) that his testimony "was of such a nature as to permit contradiction by documentary proof" and (p. 62) by "his own admission he [was] chargeable with perjury". As to one expenditure, Finkel "offered three distinct explanations" (p. 61) and as to another, he "gave many different explanations". The "contradictions and changes in his testimony" and "his denials of the evidence set forth in his own records" led the court to conclude (p. 65) that his answers were "answers in form only and were clearly tantamount to a refusal to answer".

In the leading case of *Ex parte Hudgings* (249 U. S. 378, 383), relied upon by the Appellate Division in the *Finkel* case and cited by us in *Falk*, the Supreme Court held: "In order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further

element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States* v. *Appel*, 211 Fed. Rep. 485." (See, also, *United States* v. *McGovern*, 60 F. 2d 880; *Blim* v. *United States*, 68 F. 2d 484.)

The court then warned of the danger of "mistakenly attribut[ing] a necessarily inherent obstructive effect to false swearing", since "it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt *with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful*; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled." (p. 384, emphasis supplied.)

It is significant to note that in *Hudgings* the order of commitment "directed that it should continue in force until the petitioner had purged himself of the contempt for which he was being punished" (p. 382). In holding that "the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect" and hence was unlawful, the Supreme Court (p. 384) noted that "when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, *the impression necessarily arises* that it was assumed that the power existed to hold the witness in confinement under the punishment *until he consented to give a character of testimony which in the opinion of the court would not be perjured.*" (Emphasis supplied.)

Finally, in *In re Michael* (326 U. S. 224) the witness had been adjudged in criminal contempt and sentenced to six

months' imprisonment "on findings that he had given 'false and evasive' testimony before a Grand Jury which 'obstructed the said Grand Jury in its inquiry and the due administration of justice'" (p. 225). The Supreme Court granted certiorari "in view of the close similarity of the issues here to those decided in *Ex parte Hudgings*, 249 U. S. 378" (p. 225), and, in defining the necessary element of obstruction, said (pp. 227-228): "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses. It is in this sense, doubtless, that this Court spoke when it decided that perjury alone does not constitute an 'obstruction' which justifies exertion of the contempt power and that there 'must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty.' *Ex parte Hudgings, supra*, 382, 383, 384. And the Court added, 'the presence of that element [obstruction] must clearly be shown in every case where the power to punish for contempt is exerted.'"

The court reversed the conviction because "no element except perjury" was "'clearly shown'" (p. 228), and in so doing provided us with the only workable test in distinguishing between the false answer and the answer that is so false and evasive as to amount to no answer at all. In this connection, the court held that "a reading of the evidence persuades us that the Circuit Court of Appeals correctly found that [the witness] had *directly responded with unequivocal answers. These unequivocal answers were clear enough so that it then are shown to be false*

petitioner would clearly be guilty of perjury." (p. 226; emphasis supplied.) The court distinguished the *Appel* case on the ground that the testimony there "was 'on its mere face, and without inquiry collaterally, * * * *not a bona fide effort to answer the questions at all*' " (pp. 228-229; emphasis supplied). (See, also, *Nilva* v. *United States*, 352 U. S. 385, 398; *Brown* v. *United States*, 356 U. S. 148, 153.)

It must be remembered that in the *Falk* case this court held (258 N. Y. 439, *supra*): "We are not at liberty to say, * * * that 'the testimony is not a *bona fide* effort to answer the questions at all' * * *", and in the *Foster* case (263 N. Y. 314, *supra*) we similarly held: "Nothing on the face of the judgment debtor's evidence * * * suggests that it was not a *bona fide* effort to answer the questions." (See, also, *People* v. *Caidin*, 238 App. Div. 813, appeal dismissed 267 N. Y. 551.)

The teaching of the *Michael* case *supra* is that if the witness directly responds with *unequivocal answers* which are *clear* enough to subject him to a *perjury indictment*, then he has made a "bona fide effort to *answer*" and may not be summarily committed for refusing to answer.

The obvious advantage of this test is that it focuses exclusively on the internal content of the witness's answers, and avoids any need of characterizing the testimony by such nebulous and elusive standards as "palpably false and evasive of the obligation to answer", "so false as to offer not the slightest probability of truthfulness", "so false and preposterous as to preclude the raising of any issue of fact", and "so patently obstructive and evasive as to raise no issue of fact". All four of the quoted standards were invoked by the Appellate Division at one point or another in its opinion, and the court itself recognized that the terminology used was "hardly satisfactory". The chief difficulty in applying these nebulous

standards is that the mere statement of any one of them requires a further definition of just what it means, and the process of definition and redefinition can continue *ad infinitum*. In our opinion, the only meaningful standard by which it may be determined whether each of the relators "submit[ted] to do the act which he was required to do" (Civ. Prac. Act, § 406, subd. 3) is whether he "directly responded" to the enumerated 26 questions "with unequivocal answers * * * clear enough so that if they are shown to be false [he] would clearly be guilty of perjury" (*In re Michael, supra*, p. 226). If they did so respond, then they have purged themselves of their refusal to answer and their perjury, if any, must be proven and punished in the criminal tribunal in accordance with the safeguards of the criminal law. When the answers given by Frank and Costenze are carefully measured against this standard, it becomes apparent that, though they may have been false, they were definite and unequivocal (see *In re Michael, supra*, p. 226, n.).

The Appellate Division's basis for distinguishing between the answers given by relators was that "since both Frank and he had concurred that it was he who brought Frank to the meeting, he had the heavier burden to explain the happening of the event." The aspects of Costenze's testimony which in its opinion distinguish his answers from Frank's related to (1) the former's knowledge of Barbara's illness; (2) his failure to find out whether his presence was an intrusion; (3) his estimate of the number of persons present at Apalachin, and (4) his failure to ask his host obvious questions. Frank's situation was no different from Costenze's, except that the latter had known Barbara before. The commission as well as the relators agree that there can be no distinction between Frank and Costenze. Both Frank and Costenze had exactly the same burden in this proceeding, namely, to supply definite an-

swers to 26 identical questions and thus purge their refusal to answer. To each of these questions each witness gave a definite answer and thereby subjected himself to a multi-count perjury indictment, if the answers are shown to be false. It bears constant repetition that the truth or falsity of the answers is immaterial here.

We are not unmindful of the problem of the commission in seeking to uncover the true purpose of the gathering at Apalachin. But if, as we have said, "Punishment for a criminal contempt [by not more than 60 days' imprisonment] is a drastic remedy for willful wrong" (*Matter of Spector* v. *Allen*, 281 N. Y. 251, 259; *People* v. *De Feo*, 308 N. Y. 595, 605, *supra*), then an indefinite incarceration for a refusal to answer questions must be sanctioned with even greater caution. A reading of this record impels us to the conclusion that relators were in effect "sentenced" by Special Term to imprisonment" with the object or purpose of exactly from [them] a character of testimony which the court would deem to be truthful" (*Ex parte Hudgings*, *supra*, p. 384). If "the power existed to hold a witness in confinement * * * until he consented to give a character of testimony which in the opinion of the court would not be perjured", then "it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness * * * would be gravely imperiled" (Id.).

By keeping relators in prison until they supply answers which satisfy the commission and the courts, they are not only being sentenced to conceivable life imprisonment, without a trial by jury or any of the other traditional rights which the law accords to a defendant, but they are in effect being compelled to admit they committed perjury in giving the answers they did. Such an arbitrary deprivation of liberty makes a hollow mockery of the phrase "due process of law". To call a phrase from Chief Judge

Cardozo, used in a different context but appropriate here, "A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price. * * * " (*Matter of Doyle*, 257 N. Y. 244, 268).

The order of the Appellate Division respecting Frank Valenti should be affirmed, and the order of that court respecting Costenze Valenti should be reversed, and his discharge directed.

Burke, J. There is no discernible distinction in the degrees of falsity between the answers given by Costenze Valenti and Frank Valenti which justifies different treatment on these appeals. Alleged differences based upon the fact that one relator drove the automobile to Apalachin, N. Y., and the other relator was a passenger are slight. The answers given which are obstructive of the investigation were concerned with the six hours spent at the premises of Mr. Barbara. Both relators were confined under similar court orders until they would answer "truthfully and responsively" the questions put to them by the Commission of Investigation. Incredible, evasive, inconsistent testimony designed to thwart the legitimate object of the inquiry does not constitute compliance with the court order, and serves no basis for the issuance of a writ of habeas corpus. (Cf. *People ex rel. Falk v. Sheriff*, 258 N. Y. 437; *United States v. Appel*, 211 F. 495.) It is no answer that relators may be subject to prosecutions for perjury, since that remedy is designed solely to punish relators and will not achieve the purposes of section 460 of the Civil Practice Act, which is designed to obtain truthful answers to legitimate objects of investigation and inquiry.

Accordingly, the order of the Appellate Division affirming the dismissal of the writ of habeas corpus as to Cos-

tenze P. Valenti should be affirmed. The order of the Appellate Division granting the writ of habeas corpus to Frank J. Valenti should be reversed, and the writ dismissed.

DESMOND, J. (concurring). I believe that Costenze Valenti's answers were on their face not only false but so clearly evasive and obstructive as to amount to a refusal to answer at all and so were contemptuous and contumacious as matter of law. But, like the Appellate Division, I feel differently as to the answers of Frank Valenti which answers, as pointed out in the Appellate Division opinion, may be considered sufficiently responsive so as to raise an issue of credibility only. Accordingly, I am in full agreement with the Appellate Division and vote to affirm.

In each case the order should be affirmed.

Upon the appeal of the People as to Frank Valenti: Order affirmed.

Judges FULD and VAN VOORHIS concur with Judge FROESSEL; Judge DESMOND concurs in result in a separate opinion.

Upon the appeal of the relator, Costenze P. Valenti: Order affirmed.

Chief Judge CONWAY and Judge DYE concur with Judge BURKE; Judge DESMOND concurs in result in a separate opinion.

Orders affirmed.

APPENDIX B

Statutes Involved

Section 406 of the Civil Practice Act of the State of New York.

Subpoena issued by judge, arbitrator, referee or other persons, in certain cases.

1. When a judge, or an arbitrator, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for the service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2. A person, who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefore, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as

prescribed in the case of a person failing to obey a subpoena issued out of a court of record. If he fails to attend, the person issuing the subpoena if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to the act which he was so required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person, issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action.

Amendment XIV of the Constitution of the United States.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Title 28 United States Code Section 1257.

State Courts; Appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

* * * * *

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS

State of New York

Index #41126/1958

People of the State of New York, ex rel. Costenze P. Valenti, on the Petition of Gilbert S. Rosenthal,
Appellant

against

John J. McCloskey, Sheriff of the City of New York, etc., and Commission of Investigation of the State of New York,
Appellee

Sirs:

I. Notice is hereby given that Costenze P. Valenti, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order and judgment of the Court of Appeals of the State of New York of July 8, 1959, which order and judgment affirmed the order and judgment of the Supreme Court of the State of New York, Appellate Division, First Department, dated May 8, 1959, which affirmed the order and judgment of Mr. Justice Nathan, dated March 25, 1959, entered in the Supreme Court, New York County, on March 26, 1959. The

order of Mr. Justice Nathan dismissed a Writ of Habeas Corpus brought on behalf of the appellant in a proceeding in the Supreme Court of the State of New York, County of New York (a court of original jurisdiction). The aforementioned Writ of Habeas Corpus sought the appellant's release from the Civil Jail and from the custody of the Sheriff of the City of New York. The appellant has been continuously incarcerated since August 22, 1958 in said jail under the order and warrant of commitment of Mr. Justice Tilzer of the Supreme Court of the State of New York, New York County, dated August 22, 1958, made under the alleged authority contained in §406 of the Civil Practice Act of the State of New York. It was appellant's contention, before Mr. Justice Nathan, that he had complied with the provisions of the aforementioned warrant and order of commitment made pursuant to §406 of the Civil Practice Act and was entitled to his immediate release. He asserted that he had answered the critical twenty-six questions which questions, on a prior occasion, he had refused to answer. He submitted that his continued confinement and the resort to matters not contained in his answers to the twenty-six questions were violative of his rights under the United States Constitution, being a denial of due process, and abridging the privileges and immunities guaranteed him by Amendment XIV of the Constitution of the United States.

II. This appeal is taken pursuant to Title 28, U. S. C. A. §1257 (2).

III. The Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Notice of Appeal to the Supreme Court of the United States.

2. Opinion of the Court of Appeals of the State of New York.

3. Order and judgment of affirmance of the Court of Appeals.

4. Notice of Appeal to the Court of Appeals.

5. Order of Affirmance of the Appellate Division of the Supreme Court of the State of New York, First Department.

6. Opinion of the Appellate Division of the Supreme Court of the State of New York, First Department.

7. Notice of Appeal to the Appellate Division of the Supreme Court of the State of New York, First Department.

8. Order of Mr. Justice Nathan of the Supreme Court of the State of New York, New York County, appealed from.

9. Opinion of Mr. Justice Nathan of the Supreme Court of the State of New York, New York County.

10. Writ of Habeas Corpus, allowed by Mr. Justice Nathan, March 20, 1959, together with petition of Gilbert S. Rosenthal, dated and verified, March 20, 1959.

11. Order of Commitment of Mr. Justice Tilzer of the Supreme Court of the State of New York, New York County, dated August 22, 1958.

12. Warrant of Commitment of Mr. Justice Tilzer of the Supreme Court of the State of New York, New York County, dated August 22, 1958.

13. The twenty-six questions, more particularly set forth in the Warrant and Order of Commitment of Mr. Justice Tilzer, and the answers to the same as is

recorded in folios 627-637, inclusive, appearing at pages 209-213 of the Record on Appeal to the Court of Appeals of the State of New York.

IV. The following questions are presented by this appeal:

1. §406 of the Civil Practice Act of the State of New York, pursuant to whose terms the appellant, Costenze P. Valenti, is being held in custody by the Sheriff of the City of New York, is in violation of and repugnant to §1, Amendment XIV of the Constitution of the United States, in that it deprives the appellant of life and liberty without due process of law, for the following reasons:

A. §406 of the Civil Practice Act decrees the confinement of an individual for his refusal to answer certain questions of a reasonable and proper character outside the presence of the Court. It, however, fails to delineate or reveal, directly or indirectly, the manner and method, and by whom, an adjudication and determination shall occur regarding any assertion that the witness has complied with the original order of commitment.

B. §406 of the Civil Practice Act fails to set forth or describe any norm or guide to demonstrate the fact of compliance with the order of commitment or the failure thereof.

C. §406 of the Civil Practice Act permits a summary commitment of an individual but, despite the severity of the punishment, does not define for or acquaint the person with the standards requisite for compliance with and satisfaction of the order of commitment and the purging of his contempt.

D. §406 of the Civil Practice Act permits an unlimited and unbridled use of judicial and administrative discretion in determining the act of compliance and, therefore,

per se, provides for a gross abuse of discretion and fosters the same.

E. §406 of the Civil Practice Act, under the guise of a contempt proceeding, permits the imprisonment of a witness for the crime of perjury. It therefore denies to the individual the basic constitutional concept of "fair play". This becomes exceedingly onerous when the witness is subjected to confinement for the remainder of his life, a most unusual form of "cruel and inhuman treatment".

F. §406 of the Civil Practice Act demands a form of compliance and a character of testimony that is at war with truth by requiring that the opposing party, agency or Court be satisfied with the responses of the witness as a condition precedent to release.

2. §406 of the Civil Practice Act of the State of New York violates and is repugnant to that portion of §1, Amendment XIV of the United States Constitution which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, as well as the due process clause of the above amendment, in that:

A. §406 provides for an indefinite life sentence without establishing, containing or allowing the witness to submit proof of his compliance with the order of commitment in an effort to purge his contempt and obtain his release.

B. §406 of the Civil Practice Act permits the continued confinement of the witness despite the fact that further coercive confinement is rendered moot and academic because the information originally demanded of the witness is possessed by the agency opposing the release and has been obtained through other witnesses appearing before it.

3. The Courts below substantially enlarged the scope and power of §406 of the Civil Practice Act and the order of commitment and, in so doing, denied to the appellant, Costenze P. Valenti, his guaranteed rights under §1, Amendment XIV of the Constitution of the United States. The State Courts failed to ground their determinations upon the appellant's answers to the critical twenty-six questions and relied, instead, upon the entire record of the hearings had before the appellee, the Commission of Investigation of the State of New York. This reliance gave sustenance to appellant's contentions that his answers were not on their face "palpably false" and were in complete compliance with the statute and the order of commitment. They further resorted to, utilized and compared testimony given by other witnesses summoned before the appellee, de hors this record, and determined that appellee's responses were not in compliance with the original order of commitment. The Courts below punished an alleged perjury as a contempt under §406 of the Civil Practice Act without adhering to the basic requirements of adjective due process of law under the Constitution of the United States.

Dated, New York: October 5, 1959.

Yours &c.

GILBERT S. ROSENTHAL
Attorney for Appellant,
Costenze P. Valenti,
280 Broadway
New York 7, N. Y.

To:

Clerk of the Supreme Court
of the United States

Clerk of the Court of Appeals
of the State of New York

Clerk of the County of New York

Hon. Louis Lefkowitz,
Attorney General of the
State of New York

Eliot H. Lumbard, Esq.,
Chief Counsel of the
Commission of Investigation
of the State of New York.

APPENDIX D

ORDER OF COMMITMENT

At a Special Term, Part I, of the Supreme Court of the State of New York, County of New York, held at the County Court House, Centre and Pearl Streets, Borough of Manhattan, New York City, on the 22nd day of August, 1958.

Present:

HON. GEORGE TILZER,
Justice.

Index No. 41126/58

In the Matter

of

the Application of the COMMISSION OF INVESTIGATION of the State of New York by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Petitioner,

to Commit

COSTENZE PETER VALENTI,

Respondent,

to Jail, Pursuant to Section 406 of the Civil Practice Act.

The motion having regularly come before me to be heard on the 22nd day of August, 1958, for an order under Section 406 of the Civil Practice Act directing the issuance of a warrant to the sheriff of the City of New York or to the sheriff of any other county in the State of New York

wherein Costenze Peter Valenti may be found, commanding that he be arrested and committed to the jail of the county wherein he is apprehended, and upon the order to show cause granted by the Court on the 19th day of August, 1958, the affidavit of Myles J. Lane, one of the Commissioners and Chairman of the Commission of Investigation of the State of New York, verified the 19th day of August, 1958, and the papers therein referred to and thereto attached, and after hearing Eliot H. Lumbard, Chief Counsel for said Commission of Investigation, in support thereof, and Gilbert S. Rosenthal, Esq., in opposition thereto, together with a transcript of testimony before the said Commission and made an exhibit herein, and upon all papers and testimony and proceedings had herein and due deliberation having been had, it is

ORDERED that said motion be and the same is hereby granted in all respects, and it is further

ORDERED that a warrant issue to the sheriff of the City of New York, or to the sheriff of any other county in the State of New York wherein respondent Costenze Peter Valenti may be found, commanding him to arrest the said Costenze Peter Valenti and to commit him to jail of the county wherein he is apprehended, there to remain until he answers truthfully and responsively, before the said Commission of Investigation, to wit: the following questions concerning the meeting held at the premises of Joseph Barbara at Apalachin, New York on November 13 and 14, 1957:

1. Q. Do you know Joseph Barbara of Apalachin, New York?

2. Q. Were you at the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957? I show you photographs, marked Commission's

Exhibits 2 and 3, of Joseph Barbara's home and premises at Apalachin and ask you whether you recognized these premises. Have you ever been to these premises?

3. Q. During what hours were you at the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

4. Q. Did you attend a meeting on the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

5. Q. Who asked or directed you to go to the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

6. Q. Did you know before you arrived who would be present at the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

7. Q. How did you travel to the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

8. Q. With whom did you travel to the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

9. Q. Where did you spend the night on November 13, 1957?

10. Q. Where did you spend the night on November 14, 1957?

11. Q. At what time did you arrive at Apalachin, New York, on November 14, 1957?

12. Q. Who served the food and drinks to the persons gathered on the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

13. Q. When were the food, drinks and other refreshments served?

14. Q. Approximately how many persons were present at premises of Joseph Barbara in Apalachin, New York, on November 14, 1957 while you were there?

15. Q. Whom did you meet at the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

16. Q. Did you meet Joseph Barbara in Apalachin, New York, on November 14, 1957?

17. Q. Whom else did you see at the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

18. Q. Were any public officials present at the meeting?

19. Q. With whom did you talk while on the premises of Joseph Barbara in Apalachin, New York, on November 14, 1957?

20. Q. What was discussed?

21. Q. What was the general subject of discussion at the meeting?

22. Q. Who addressed the meeting?

23. Q. Did you address the meeting?

24. Q. Have you had business dealings with anyone you met at the meeting?

25. Q. Had you previously known anyone you saw at the meeting?

26. Q. What was your purpose in going to the meeting?

or is otherwise discharged according to law.

ENTERED

G. T.
J. S. C.

FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 4 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 563

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. COSTENZE P. VALENTI, on the petition of GILBERT S. ROSENTHAL,

Appellant,

—against—

JOHN J. McCLOSKEY, Sheriff of the City of New York, etc., and COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

ELIOT H. LUMBARD,
Chief Counsel, Commission of Investigation,
Attorney for Appellee,
270 Broadway,
New York 7, N. Y.

NATHAN SKOLNIK,
Deputy Commissioner,

ARNOLD M. WEISS,
Assistant Counsel,

Of Counsel.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This is a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an order of the New York Court of Appeals, entered July 24, 1959, affirming dismissal of a writ of habeas corpus

brought on behalf of appellant, and affirming an order of the Appellate Division of the Supreme Court, First Department, to the same effect (877).* That Court had unanimously affirmed, with an opinion by Breitel, *J.*, (889, *et seq.*), a similar order of the Supreme Court of New York County, entered March 26, 1959 (28). In that Court appellant had sought his release from commitment resulting from his appearance as a witness before the Commission of Investigation of the State of New York. The Commission had refused to consent to his release on the ground of the nature of appellant's responses.

The Courts of New York all held for that reason appellant should not be released.

The opinion of the Supreme Court, New York County, Nathan, *J.* is reported as *People ex rel. Valenti v. McCloskey, and Commission of Investigation*, 17 Misc. 2d 695, 186 N. Y. S. 2d 798 (S. C. N. Y. Co., 1959). Mr. Justice Breitel's opinion is reported at 8 A. D. 2d 74, 185 N. Y. S. 2d 952 (1st Dept. 1959); the affirmance by the Court of Appeals is reported at 6 N. Y. 2d 390 (1959) (and see Jurisdictional Statement, Appendix "A", page 15).

Appellant originally had been committed to jail pursuant to an order and warrant issued under the authority of Section 406, New York Civil Practice Act, for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting" held in the State of New York at Apalachin, Tioga County. The validity of appel-

* Numbers in parentheses refer to folio numbers in the consecutive record on appeal to the New York Court of Appeals in the proceeding *People ex rel. Valenti v. McCloskey and Commission of Investigation*, [illegible]

lant's initial commitment was upheld in *Commission of Investigation* v. *Lombardozzi, et al. (C. P. Valenti)*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959); certiorari was denied and appeals dismissed in the various companion cases brought to this Court. See, e. g., *Castellano* v. *Commission of Investigation*, 360 U. S. 930 (1959); *Mancuso* v. *Commission of Investigation*, 361 U. S. 10 (1959).

It is the position of the Commission that this Court has no jurisdiction in this matter and, in any event, the arguments raised by appellant were properly decided by the New York courts, and are not substantial or worthy of consideration by this Court. The appeal should be dismissed.

The Commission

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York, Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York State Crime Commission in 1953 were followed closely by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administration of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.

> This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities'. The American Bar Association has made a similar recommendation." *First Report of the New York State Crime Commission*, Leg. Doc. No. 23 (1953), pp. 27-30.

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

> "Section 2(1)(a). The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering*;
>
> "(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
>
> "(c) Any matter concerning the public peace, public safety and public justice." (Italics added).

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions and statutes are set forth in Appendix "B" to the Jurisdictional Statement at pages 33, *et seq.*

The Facts

The Apalachin Meeting

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara, Sr. in Apalachin, Tioga

County, New York, a large number of persons who reside in various sections of this country and abroad. Appellant is a New York resident and was among this group.

Over 62 persons have been identified publicly as attending the meeting; it has come to be referred to as the "Apalachin Meeting". Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activities of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location on a November Thursday—indicates extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for these purposes commenced in the Criminal Courts Building, New York County, on August 12, 1958. The subpoena by which appellant and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not

limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957, at Apalachin, Tioga County, State of New York.*" (Italics added).

At the outset of the hearings, the Chairman of the Commission introduced and gave to appellant an opening statement which set forth the purposes of the hearing in considerable detail. As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings; the resolution again set forth the purpose and subject matter of the investigation. Appellant has been represented by counsel throughout all the Commission and court proceedings.

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Appellant's Conduct at His First Hearing Before the Commission

An individual hearing was held for appellant before the Commission on August 19, 1958. A similar pattern of events occurred regarding appellant and the other witnesses during their respective Commission hearings in August of that year.

Questions were directed to appellant by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at, the Apalachin Meeting". Other than merely identifying himself, appellant refused absolutely to

answer all questions. His refusals were based on his privilege against self-incrimination.

Acting under the authority of Section 7 of its Act, Section 7057, New York Unconsolidated Laws, and in accordance with Section 2447 of the New York Penal Law, the Commission thereupon voted to confer and did confer immunity upon appellant. The Commission's action and the effect of its decision regarding immunity were explained to appellant as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission. After this instruction the same questions were directed to appellant by the Commission. Appellant again refused to make any answer. On behalf of the Commission the Chairman specifically directed and ordered appellant to answer each question as it was put to him. Appellant nevertheless persisted in his refusal to answer.

After appellant had followed this pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings. The Commission thereupon moved in the Supreme Court, New York County, for an order pursuant to Section 406, New York Civil Practice Act, directing issuance of a warrant to confine appellant to New York Civil Jail until "he answers truthfully and responsively" the Commission's inquiries. After a hearing in the Supreme Court the Commission's motion was granted, and the order and warrant of commitment issued from that Court on August 22, 1959. Appellant was then committed.

With others similarly confined, appellant appealed this determination through the New York courts. But he did not join the others in seeking review in this Court of the final determination against him by the New York Court of Appeals on March 13, 1959. It is the opinions in this stage of the proceedings which are cited at page 3, *supra*, as *Commission of Investigation* v. *Lombardozzi, et al.*, (C. P. Volpati).

Appellant's Conduct at His Second Hearing Before the Commission

Rather than appeal to this Court with his fellows, appellant notified the Commission after the decision of the Court of Appeals that he finally wished to testify before the Commission in an effort to secure his release; he represented that he desired to satisfy the terms of the order and warrant of commitment which required him to respond "truthfully and responsively" (126).

At a hearing before the Commission on March 19 and 20, 1959 appellant gave some sort of responses to the various questions contained in the order of commitment, as well as related areas of inquiry (454-830). At the conclusion of appellant's testimony the Chairman of the Commission said in part:

> "As has already been clearly indicated on this record by Commissioner Lane and myself, and by counsel, it just taxes our credulity to believe that this man, as well as many of the others who told a similar story, just happened to pick November 14, 1957 to visit their sick friend, Joe Barbara. The story just doesn't have the ring of truth.

"I want to say to you, Mr. Valenti, that we do not believe you have told us the truth, but I just want to advise you that at any time that you are prepared to come forward and tell us the truth the Commission will be ready to hear you." (827-8).

It is the nature of appellant's testimony during this second hearing which has been the subject of extensive consideration and characterization by the courts of New York and resulted in the final order of the New York Court of Appeals from which appellant is appealing in this instance. The Supreme Court, New York County, the Appellate Division, First Department, and the Court of Appeals held appellant's testimony to be of such a specific factual nature as not to constitute compliance with the order and warrant of commitment; as a result, appellant was continued in confinement for the flagrant nature of his responses.

Indeed, every judge who applied the governing legal standard in New York found appellant's testimony such as to require his continued confinement. That standard has been adopted from the time honored law of criminal contempt in New York insofar as it applies to the nature and quality of testimony: "false, evasive and obstructive of the inquiry." The minority of the Court of Appeals attempted to establish an entirely new and novel standard by which testimony would be measured, and their factual determination is restricted to measurement against their statement of their new standard.

Appellant's Conduct at His Third Hearing Before the Commission

On December 8, 1959, appellant received a third hearing before the Commission to "affirm, change or modify" the testimony he gave during the second hearing.

This testimony is not set forth in the record on appeal filed with the Court in this proceeding, and is brought to the Court's attention because events subsequent to the printing and filing of that record on appeal, and appellant's Jurisdictional Statement, concerning the second hearing are of such significance and so controlling that justice so requires.

At the outset of the third hearing appellant's counsel listed a number of respects by which appellant wished to change his prior testimony at the second hearing. Only several of those areas were material to the pertinent aspects of the Commission's inquiry. After appellant so testified, the Commission again refused to consent to his release.

Immediately after this third hearing a writ of habeas corpus was obtained on behalf of appellant to raise the issue of his continued confinement under the aforementioned order and warrant. After a hearing, the Supreme Court, New York County, rejected this claim and dismissed the writ, the result being a determination that in the opinion of the Court, appellant should be continued in confinement. The Court held appellant had not significantly altered his position so as to bring him outside the holdings as to his prior testimony.

On December 11, 1959, appellant sought *and obtained* bail in the sum of $15,000 pending appeal to the Appellate Division, First Department, from the lower court's decision as to this third stage of the entire proceedings. The Jurisdictional Statement was filed with this Court only several days before appellant was released on bail. Contrary factual representations in the Statement concerning appellant's continued confinement, therefore, (as at pages 6 and 8) are no longer true.

ARGUMENT

POINT I

The appeal is moot and premature.

Appellant's subsequent attempt in the New York courts to seek his release under Section 406 of the Civil Practice Act, the same statute which he attacks here as unconstitutional, requires the dismissal of his appeal on two legal grounds:

A. The Appeal is Moot:

The crux of appellant's position in this Court is the alleged unconstitutionality of a New York statute, Section 406. But after setting forth that position in his Notice of Appeal to this Court, he proceeded in the New York courts once again to invoke the same statute to secure his release. This attempt was made after his third hearing before the Commission and is now before the Appellate Division, First Department. Thus, there no longer is an actual case or controversy before this Court. By his inconsistent action appellant has waived his legal position and rendered his

appeal moot. See *Castellano* v. *Commission of Investigation*, 361 U. S. 7 (1959).

B. The Appeal is Premature:

Appellant is engaged in proceedings in the New York courts which, if successful, threaten to frustrate and make totally ineffective a final decision of this Court. Indeed, this appeal is but another extension of the "second stage" of this proceeding, whereas appellant's present State actions already have entered the "third stage".

Under such circumstances this Court should exercise its discretion not to entertain this appeal.

POINT II

The Federal questions here alleged by appellant were never raised nor passed upon in the New York courts.

Appellant has failed to comply with the essential jurisdictional burden placed upon him by Title 28, United States Code, Section 1257(2), codified in Rule 15(d) of the Revised Rules of this Court, to wit, that he demonstrate "affirmatively" and "positively" that the Federal questions alleged as the jurisdictional basis for the appeal were raised and passed upon in the State courts below. *Live Oak Water Users Ass'n* v. *Railroad Commission of California*, 269 U. S. 354 (1926); *Oxley Stave Company* v. *Butler County*, 166 U. S. 648 (1897).

But it would be impossible for appellant to make such a showing since no Federal question was ever

raised or passed upon below. A search of the entire record and all the New York court files in this proceeding reveals it to be barren of such prior claims. Apparently appellant's sole jurisdictional reliance in this regard is based upon the use of the phrase "due process of law" in the minority opinion of Judge Froessel of the New York Court of Appeals. But that passage, and Judge Froessel's entire opinion, contain no reference to the United States Constitution and there is no such reference in the remittitur or final order of that Court. It is impossible to say that the Court of Appeals considered a Federal "due process" issue. Under these circumstances, the reference to "due process" in Judge Froessel's opinion will be presumed, as certainly it must, to refer to State procedure and State due process if it contains no explicit reference to Federal issues. *Bowe* v. *Scott*, 233 U. S. 658 (1914); *Osborne* v. *Clark*, 204 U. S. 565 (1907).

POINT III

Appellant's basic dispute is with a factual determination against him by the State courts and does not involve a Federal question.

In the stage of these proceedings of which appellant now makes complaint, the New York courts have made a definitive factual determination that the nature and quality of his responses to the Commission's inquiries concerning the Apalachin Meeting were false, evasive and obstructive of the Commission's inquiry. Appellant's confinement has been continued solely as a result of that factual determination. In reaching that

determination the New York courts also determined several matters of New York civil procedure by which Section 406 proceedings such as this are to be governed in the New York courts; those civil procedural matters are the sole concern of the courts of New York.

The substantive standards by which the nature and quality of appellant's answers were measured were taken by the New York courts from the traditional law of contempt as it has existed in New York for several centuries. There is nothing new, novel or unfair about that standard. To the contrary, every one of the six other witnesses similarly confined with appellant in August 1958 has obtained his release from confinement under the identical substantive standards and procedures. The Commission opposed the release of those witnesses and the New York courts have ruled to the contrary. Thus it could not be more certain that it is not the legal procedure that is "unfair" or hopelessly enmeshes appellant for a "term of life imprisonment" without the basic or fair procedural safeguards to which he is entitled. Rather, it is the factual characterization of his particular answers to the Commission's specific questions and in that context this Court should not be concerned with or exercise its discretion to review such a purely factual determination by state courts.

POINT IV

In any case, the alleged Federal questions are not substantial or worthy of consideration by this Court.

In his Jurisdictional Statement appellant raises a large number of alleged Federal questions. These alleged Federal questions are insignificant, unsubstantial and largely duplicitous; in addition, they were not raised below, as discussed previously. Each of these questions is considered in the order they are set out in the Index to the Jurisdictional Statement.

1. "May a statute, imposing a life sentence, demand compliance, without setting forth the manner, method and by whom compliance shall be determined."

The manner of determining compliance with a Section 406 order is the same as for any other order of a court, to wit, the court itself decides whether the facts presented to it constitute compliance. The method used to determine compliance also is the same as for any other order of the court, to wit, presentation to the court through affidavit or otherwise of the facts of alleged compliance or non-compliance; the New York Court of Appeals held this procedure was to be followed in Section 406 proceedings. *People ex rel. Falk* v. *Sheriff*, 258 N. Y. 437 (1932).

Moreover, Section 406 does not impose a "life sentence." Appellant may be released by simply telling the truth. "The keys to his prison are in his pocket." *Penfield* v. *Securities & Exchange Commission*, 330 U. S. 585, 590 (1947).

2. "May such statute fail to provide a guide revealing the fact or failure of compliance."

Section 406(3) itself states the "guide" for compliance is whether the witness "refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper . . . ." The New York cases interpreting this and similar statutes are legion and it has been established that answers which are false, evasive and obstructive of the inquiry are tantamount to refusal to answer. Such a standard meets all legal requirements and was applied in this case. *People ex rel. Valenti v. McCloskey and Commission of Investigation, supra.*

3. "May a summary commitment, based on a contempt outside the court, be allowed without Due Process of Law and without informing the contemnor as to what is required for compliance".

This statement has no relation to the facts of this or any other Section 406 case. First of all, appellant's conduct, is not "a contempt outside the court." Secondly, at all stages of this proceeding appellant has known exactly what he was being questioned about and why he was before the Commission. Moreover, the specific questions which form the legal basis for his commitment are contained in the very order and warrant of commitment which appellant has diligently studied for the sixteen months of his confinement for refusing to make truthful and responsive answers to them. Finally, Section 406 is an admittedly coercive but civil statute; it is not criminal and does not impose punishment in the sense of criminal sanctions. This type of issue was raised in this Court by the four

other witnesses who sought review in this Court, either by certiorari or appeal; each was denied or dismissed and the Commission's briefs in those cases discuss various aspects of this alleged point at length if further reference is thought desirable. (Certiorari: Miranda, No. 893, October Term, 1958; Riccobono, No. 935, October Term, 1958; Castellano, No. 940, October Term, 1958. Appeal: Castellano, No. 72, October Term, 1959; Mancuso, No. 117, October Term, 1959.)

4. "Does not a statute provide for unbridled discretion when it subjects a witness to the whim of Court and Agency"?

The Commission's determination concerns only the question of whether or not the Commission shall consent to appellant's release. That determination is in no way binding upon the courts, which make independent determinations of the facts of each case. *People ex rel. Valenti* v. *McCloskey and Commission of Investigation, supra; People ex rel. Falk* v. *Sheriff, supra.* The discretion of the Court is narrowly confined to factual determinations within the orbit of the controlling procedure and substantive standards established in New York; this is not "unbridled discretion" by any analysis, nor is anyone being subjected to the "whim of Court and Agency."

5. "May perjury be punished as a contempt".

There is no such issue in this case for appellant has not been charged with or tried for perjury or contempt. But even if that were the case, it is obvious a witness by his testimony may commit both perjury and contempt at the same time and be subject to pun-

ishment for both. Furthermore, testimony may be such as to make a witness subject to a Section 406 proceeding as well, where the objective is not punishment (as is the case with perjury or contempt) but civil coercion as a means for compelling testimony. See *Ex Parte Hudgings*, 249 U. S. 378 (1919).

6. "May perjury be exacted as the price of compliance".

There is no such issue in this case. The object of the Commission and the courts is to exact complete and truthful disclosure from a wilful and contumacious witness who seeks at all costs to avoid so testifying although clothed with immunity. The Commission and the courts have not the slightest interest in exacting false answers or perjury.

7. "May a life sentence be imposed without providing for a hearing, the taking of testimony, etc."

The many hearings—judicial, and before the Commission—at which testimony was received from appellant and considered by the courts, raise questions as to the seriousness and responsibility of appellant stating unfounded conclusions and attempting to make an issue here out of whole cloth.

8. "May the witness remain in confinement despite the fact that the basis of confinement has become academic".

The substance of this alleged Federal question is appellant's assumption that the Commission already has obtained from other sources the information it

seeks to obtain from appellant. This is not so. But even if it were, the Commission still has an absolute right to question appellant about those events for purposes of confirmation, possibly securing additional leads and for all the other obvious purposes for which investigations are conducted.

9 and 10: "May the scope of a statute and the order thereunder be extended to include matter not essential to determine the fact of compliance".

"May reliance be had on the entire record to ascertain the fact of compliance".

The Courts below, in deciding appellant did not comply with the order of commitment, considered only answers to the 26 and related questions. These related questions which were considered were those which "explore[d] the immediate answer given to any specific question . . . to test the scope of the denial or affirmation". (Opinion of Mr. Justice Breitel, 931-2). In any case, the question is not a constitutional one to concern this Court but merely a relatively minute question of State procedure.

Conclusion

Appellant has failed to satisfy the jurisdictional requirements of Title 28, United States Code, Section 1257(2) and this appeal should be dismissed.

No substantial Federal question worthy of consideration by this Court is raised in any event, and the appeal should be dismissed.

Should this appeal be treated as a petition for a writ of certiorari, the petition should be dismissed.

Respectfully submitted,

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